No. 15832

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE ENGLANDER COMPANY, INC., AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, WAREHOUSEMEN'S LOCAL UNION NO. 117, AFL–CIO, RESPONDENTS

PETITION OF THE NATIONAL LABOR RELATIONS BOARD FOR REHEARING

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PETITION OF THE NATIONAL LABOR RELATIONS BOARD FOR REHEARING

This petition for rehearing is addressed to that part of this Court's opinion which rejects the Board's finding that Englander "violated Section 8 (a) (2) and (1) of the Act by: Vice-President Sparrowk's referring of job applicants to the [Teamsters] on January 11, 1956, for the purpose of discussing membership in that organization and, as part of such referral, furnishing some applicants with the address of the [Teamsters]" (R. 87). This conduct, in the Board's view, was unlawful be cause it interferred with, restrained or coerced employees in their right to join, assist or bargain through representatives of their own choosing or refrain from doing so, in contravention of Section 8 (a) (1) of the Act, and because it constituted "support" to the Teamsters within the meaning of Section 8 (a) (2).

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In rejecting the Board's finding on this phase of the case, the Court states that "The test is whether actual domination or coercion is shown." (Slip opinion, p. 13.) The Board did not find that Englander violated Section 8 (a) (2) by dominating the Teamsters but, rather, by contributing support to it. Moreover, in finding a violation of Section 8 (a) (1), it is settled that the proper test is not whether the statements actually had the effect of interfering with, restraining or coercing employees "but whether they reasonably might be found to tend to have any such effect." The *American National Bank of St. Paul* v. *N. L. R. B.*, 144 F. 2d 268, 271 (C. A. 8). No actual coercion need be shown. *Radio Officers' Union* v. *N. L. R. B.*, 347 U. S. 17, 48–49, 50–51; *N. L. R. B.* v. *Donnelly Garment Co.*, 330 U. S. 219, 231; *N. L. R. B.* v. *Link-Belt Co.*, 311 U. S. 584, 588. In the *Radio Officers* case, the Supreme Court, quoting with approval from its prior decision in *Republic Aviation Corp.* v. *N. L. R. B.*, 324 U. S. 793, 798, 800, stated (347 U. S. at 48–49):

> * * * the statutory plan for an adversary proceeding "does not go beyond the necessity for the production of evidental facts, however, and compel evidence as to the results which may flow from such facts * * *. An administrative agency with power after hearings to determine on the evidence in adversary proceedings whether violations of statutory commands have occurred may infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based upon the facts proven. One of the purposes which lead to

> the creation of such boards is to have decisions based upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration".

Constraint and coercion are "subtle things" requiring "a high degree of introspective perception" and the Board may infer such constraint or coercion from the evidential facts. *Donnelly Garment, supra,* 330 U. S. at 231; *Radio Officers, supra,* 347 U. S. at 50. And as stated by the Supreme Court in *Link-Belt, supra,* 311 U. S. at 588:

> It would indeed be a rare case where the finders of fact could probe the precise factors of motivation which underlay each employee's choice. Normally, the conclusion that their choice was restrained by the employer's interference must of necessity be based on the existence of conditions or circumstances which the employer created or for which he was fairly responsible and as a result of which it may reasonably be inferred ~~with~~ that the employees did not have that complete and unfettered freedom of choice which the Act contemplates.

Upon the undisputed evidence and evidence which, though disputed, was accepted by this Court, the Board, we believe, was clearly warranted in finding that Englander violated the statute by referring applicants for employment to the Teamsters Union.

It is undisputed that the employees of Craftmaster, whose plant Englander subsequently leased, were represented by three unions in three separate units.

Those who worked in the upholstery department were members of, and were represented by, the Upholsterers Union (R. 198). The truck drivers were members of, and were represented by, a local of the Teamsters (R. 156–157). The mill room employees and all other production and maintenance employees were members of, and had been represented by, the Furniture Workers Union since 1936 (R. 151–152, 157, 178–179). Each of these unions had a collective bargaining contract with Craftmaster covering the employees in the unit represented by it (R. 155–157). It is also undisputed that Englander, prior to leasing Craftmasters' plant, knew of the representation of these employees by these three unions and of their respective contracts with Craftmaster (R. 117–118, 289–291, 323). Englander, moreover, contemplated hiring Craftmaster employees to operate its own similar business (R. 289).

On January 11, 1956, before Englander had actually leased the plant from Craftmaster, but at a time when it was expecting to start operations on January 16 (R. 129–130), Vice-president Sparrowk talked to 15 or 20 persons who were seeking employment, most, if not all, of whose employment had been terminated by Craftmaster on the preceding day (R. 122). According to applicant Walters, a witness called by Englander and credited in this respect by the Board, "He [Sparrowk] just gave me the address of the place and said to go up there and talk it over with the Teamsters about application for membership in the union" (R. 345–346). According to Sparrowk's own testimony, he told the applicants that he had been in-

formed by the Teamsters that they expected to represent the employees in this plant; that he gave the applicants the name and address of the local Teamster representative and "told them to acquaint themselves with the fact * * * that they could get these facts from Mr. Williams of the [Teamsters] Local No. 117", and "to go and get the information as to what [the Teamsters] could do for them" (R. 124–125, 129). Sparrowk also testified that he told the applicants, "we didn't want any problems with anybody's union, that whoever could show us that they had the majority of the people represented by their union would be the people that we would do business with" (R. 128).

The Board and Trial Examiner found that, in view of Sparrowk's awareness of the applicants' membership in the Upholsterers or Furniture Workers Unions, the fact that none of them had expresed to Sparrowk any dissatisfaction with their respective unions, the fact that Sparrowk injected a subject into the interviews which had no relevancy to the purpose for which the applicants had come to see him, and the fact that these individuals were dependent upon his approval for an opportunity to resume their employment at the plant, "it would be only natural for the job applicants, as it is evident some of them, at least, did, to construe Sparrowk's ungermane and unsolicited proposal that they go to the Teamsters Local to discuss applications for membership in that organization, as meaning that Englander preferred the Teamster Local over the other unions, and that clearance by, or membership in, the Teamsters Local was

to be a condition of employment at the plant" (R. 48–49).

Since, as the Board found, Sparrowk's statements were thus coercive in their nature, they are sufficient to support a finding that Englander unlawfully supported the Teamsters, in violation of Section 8 (a) (2), and interfered with, restrained or coerced employees in violation of Section 8 (a) (1) of the Act, without a showing that such statements actually had a coercive effect upon any employee, (See *Radio Officers Union* and other cases cited *supra.*) However, the reaction of the employees and their unions, following the interviews, shows that the employees in fact considered the statements to be coercive.

Immediately following his interview with Sparrowk, applicant Walters reported to the Teamster representative and joined the Teamsters Union (R. 345). The other applicants—or at least some of them—instead of seeing the Teamster representative, notified their own unions of what Sparrowk had told them (R. 198, 121–122). Thereupon the Upholsters Union, after first obtaining authorization from its International, set up a picket line at the plant (R. 198–199). On the following day, or on January 13, the Furniture Workers also set up a picket line (R. 183). Also, as a result of Sparrowk's conduct, both the Upholsterers and Furniture Workers Unions on January 12 filed charges with the Board, alleging that Englander had engaged in unfair labor practices (R. 9). Soon thereafter, on February 3, Furniture Worker Representative Truman offered to withdraw the picket line providing Sparrowk would hire those

of Craftmaster's former millroom employees whom Sparrowk wanted to hire and agree to a Board conducted election to settle the employees' bargaining rights (R. 157). Sparrowk, however, rejected this proposal on the ground that he was "under an agreement with the Teamsters" (R. 157). Englander, instead of starting production on January 16—the date Sparrowk had told applicants he hoped to start production—kept postponing the starting date until about a month later when the Upholsterers and Furniture Workers Union capitulated to the Teamsters, advised their members to join the Teamsters, and then proceeded to process the unfair labor practice charges which they had filed.[1]

The Board, accordingly, respectfully requests the Court to grant this petition for rehearing and, upon reconsideration, to reverse its prior holding that Englander did not violate Section 8 (a) (1) and (2) of the Act by referring applicants to the Teamsters Union in the circumstances here shown. In any event,

[1] Furniture Workers Representative Truman testified that in calling off the picket line and advising members of his Union to join the Teamsters, he told them that "to further maintain the picket line with the plant open would jeopardize their unemployment compensation, that if going to work at Englander entailed having to sign anything that the Teamsters put in front of them, to go ahead and sign it, that we were going to further process the case, we felt that we would be better off with our members inside the plant than out" (R. 173, 174–175). Upholsterers Representative Royer, on the other hand, told members of his Union that the International of that Union had made a deal with the Teamsters whereby Upholsterer members were to work under the Teamsters jurisdiction (R. 202–203). Royer thereafter testified in support of the unfair labor practice charges which his Union had filed.

we respectfully suggest that the Court delete from its opinion (slip opinion, p. 13) the statement, "The test is whether actual domination or coercion is shown," since, as we have shown, the law is settled to the contrary.

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WASHINGTON 25, D. C., December 27, 1958.

CERTIFICATE OF COUNSEL

Comes now Marcel Mallet-Prevost, Assistant General Counsel of the National Labor Relations Board, and certifies that he has read and knows the contents of the foregoing petition; that said petition is, in his judgment, well founded and it is filed in good faith and not for purposes of delay.

MARCEL MALLET-PREVOST,
National Labor Relations Board.

WASHINGTON, D. C., December 29, 1958.

U. S. GOVERNMENT PRINTING OFFICE: 1958